Advisory Opinion MEAC 2006-002

MEDIATOR ETHICS ADVISORY COMMITTEE c/o Dispute Resolution Center Supreme Court Building Tallahassee, FL 32399

June 30, 2006

The Question

I am a Certified County Court Mediator serving in county small claims court. I am concerned that a mediation procedure adopted and required by the local court may place the volunteer mediators who adhere to this procedure in violation of one or more of the Rules for Certified and Court-Appointed Mediators.

For cases that do not settle at mediation, the judge requests that the parties remain in court until they have spoken with the presiding judge about the case. When the parties appear before the judge after the case is at impasse, the judge often attempts, through instruction of the trial procedures, to urge the parties to agreement or settlement. The judge might detail trial procedures, statutes, and case law and may indicate to parties how the judge must rule in this complaint to follow the law. The judge then "suggests" that the parties return to a "second" mediation with a certified mediator [generally the same one] to negotiate an agreement based upon new information provided by the judge's instructions.

In this "second" mediation, it appears not uncommon for at least one party, sometimes both, to feel pressured into signing an agreement which has essentially been dictated by the court. I am concerned that certified mediators involved in this "second mediation" procedure may be violating the parties' rights to self-determination. Would it make a difference if in such cases, the mediators write up the agreement in the role as scriveners, and rather than signing the agreement as "mediator," they write on the document "per order of the court"?

I would appreciate a MEAC opinion in this matter.

Submitted by a Certified County Mediator
Northern Division

Authority Referenced

Florida Rules for Certified and Court-Appointed Mediators: 10.220, 10.230, 10.300, 10.310(d), 10.420, 10.900
Section 44.404(1)(b), Florida Statutes
Chabotte v. Chabotte, 707 So.2d 923 (Fla. 4th DCA 1998)

Summary

Given the judge's intervention, the mediator must carefully monitor the parties' participation in the mediation to ascertain the parties' ability to exercise self-determination and must be prepared to terminate the mediation if any party is unable or unwilling to participate meaningfully in the process. A mediator is not relieved of ethical responsibilities by writing the "agreement" up as a "scrivener."

Opinion

Since the MEAC is empowered to provide advisory opinions to mediators subject to the Rules for Certified and Court-Appointed Mediators, the answer to your question will focus on the responsibilities of the mediator. Rule 10.900(a). The role of the mediator is "to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." Rule 10.220. In contrast, the judge's role is to make the decisions in the case after a hearing. *Chabotte v. Chabotte*, 707 So.2d 923 (Fla. 4th DCA 1998). The distinction between mediation and adjudication is clearly drawn in rule 10.300, which states "[t]he purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not adjudication."

Mediators must always be sensitive to a party's ability to exercise self-determination, a cornerstone of the mediation process. Rule 10.230. This is especially true in circumstances, such as you described in your question, in which the judge indicated to the parties how s/he was likely to rule. For some parties, a suggestion from the judge may be treated not as an option, but as a requirement or an order, thus potentially compromising the parties' self-determination.

A mediator *shall* cancel or postpone a mediation if for any reason, a party is unable to "freely exercise self-determination." Rule 10.310(d), emphasis added. The Committee Notes to rule 10.310 stress that "the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation." The Committee recognizes that the circumstance described may not compromise the parties' self-determination. Indeed, some parties may find that the additional information from the judge assists them in understanding their legal options and making their own decisions.

The first mediation reached its statutorily defined end when impasse was declared; thus, the judge's referral constitutes a new mediation. Section 44.404(1)(b), Florida Statutes. Since there is no way of knowing in advance the impact of the judges' actions on the parties' self-determination, the mediator is obligated to provide a new orientation with specific emphasis on the fact that

"mediation is a consensual process." Rule 10.420(a). In addition, given what happened prior to the parties' return for a second mediation, the mediator must carefully monitor the parties' participation in the mediation to ascertain the parties' ability to exercise self-determination and be prepared to terminate the mediation if any party is unable or unwilling to participate meaningfully in the process. Rules 10.310(d) and 10.420(b).

The MEAC does not believe that the mediator is relieved of ethical responsibilities by writing up the "agreement" as a "scrivener" rather than a mediator. This question was raised in the context of small claims mediation, and the Committee is keenly aware that parties in small claims actions may not be familiar with the traditional court process and may be intimidated by the proceedings. The significance of a change in role from mediator to scrivener is likely to be lost on such parties who, in the worst case scenario, will continue to see the individual as a mediator and the writing of the agreement as a continuation of a mediation – one in which they may feel coerced into the outcome.

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Date Fran Tetunic, Committee Chair